

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. BK-311647-C1
Issued to: Herman E. Buffington

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2034

Herman E. Buffington

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1, now 5.30-1.

By order dated 21 November 1974, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, suspended Appellant's seaman documents for 3 months on 12 months' probation upon finding him guilty of misconduct and negligence. The specification found proved alleged that while serving as a Master on board the United States S/S SABINE under authority of the document and license above captioned, on or about 17 August 1973, Appellant:

(i) departed Bridgeport, Connecticut, on a foreign voyage to Punta Cardon, Venezuela, without signing Shipping Articles before a U.S. Shipping Commissioner to ship in foreign trade.

(ii) while serving as Master on this voyage, from 20-26 August, failed to maintain an official logbook.

(iii) while serving as Master aboard the S/S SABINE, under authority of the captioned documents, did on or about 26 August 1973 neglect and fail to navigate said vessel with due caution which in grounding off Guayanilla, Puerto Rico.

At the hearing, Appellant was represented by professional counsel and entered a plea of guilty to charge I, specification II and not guilty to all other charges and specifications.

The Investigating Officer introduced in evidence the testimony of two witnesses and eight documentary exhibits, including a factual stipulation and navigational charts used during the voyage.

In defense, Appellant offered in evidence his own testimony and two documentary exhibits.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charges and three

specifications had been proved. He then served a written order on Appellant suspending all documents, issued to Appellant, for a period of three months outright on twelve months' probation.

the entire decision and order was served on 23 November 1974. Appeal was timely filed on 18 June 1975.

FINDINGS OF FACT

On 17 August 1973, the S/S SABINE departed Bridgeport, Connecticut, bound for Punta Cardon, Venezuela, with the Appellant on board serving in the capacity of master. At the time she sailed from this port, the Master had not signed shipping articles before a U.S. shipping commissioner.

After arriving at her destination, the vessel unloaded a quantity of petroleum products and sailed on 23 August for Curaco, Netherland Antilles, where she loaded more petroleum. On 25 August 1973 the vessel departed her second port bound for Guayanilla, Puerto Rico. While attempting to negotiate the channel leading into the harbor, the vessel grounded in 29 feet of water on a shoal which bordered the channel, and which clearly marked on the navigational charts on board. The Appellant had control of the vessel at the time of the grounding and there was no local pilot on board. The Appellant had taken the S/S SABINE into the harbor in excess of ten times and other vessels in excess of forty times, and was, therefore, familiar with the positions of Coast Guard aids to navigation bordering the channel.

During the voyage the Appellant failed to keep an official logbook, which was discovered by the Coast Guard investigating officer who boarded the S/S SABINE subsequent to its grounding.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

- (i) There is insufficient evidence to support a finding of negligence;
- (ii) The constitutional rights of Appellant were violated by finding proved a charge of negligence, under specifications which were vague and indefinite; and,
- (iii) The findings under the charge of misconduct were contrary to the evidence.

APPEARANCE: Gilbert I. Low, Esq. of Orgain, Bell and Tucker

Beaumont, Texas.

OPINION

I

The allegation that there was insufficient evidence produced at the hearing to support the finding of misconduct is without merit. With regard to the specification of "failure to keep a log", 46 USC 201 requires the maintenance of such a record, and the entry therein, by the Master, or certain designated occurrences. The Appellant plead guilty to this charge and specification, thereby admitting his violation of this statute.

With regard to the specification involving "failure to execute shipping articles before departure on a foreign voyage", 46 USC 564 requires that the Master of every vessel bound from a U.S. to a foreign port shall execute a written agreement between himself and the crew members which contains a description of certain designated terms. Appellant testified at the hearing that he sailed on this voyage without having prepared these articles, that he was aware at the time of sailing that his destination was a foreign port, and that he was cognizant of the federal statutory requirements with regard to shipping articles. There was, therefore, sufficient evidence to substantiate this specification. The Appellant offered in explanation of this violation of federal law his testimony to the effect that the agent for his vessel encouraged him to sail without having executed these articles because of the alleged non availability of a U.S. shipping commissioner, before whom the contracts must be signed. However, the record is void of any evidence that tends to show that an effort was made to arrange an appointment with a shipping commissioner or that one was not available upon request. 46 USC 564 places full responsibility for execution of these agreements on the Master of the vessel. the suggestion of a port agent for the vessel that the Master should avoid the dictates of the statute is not an excuse for its violation. It was the Appellant's lack of action, not the agent's which violated the statute.

II

Appellant's arguments with regard to the finding of negligence are that the specification under this charge was unconstitutionally vague and that there was insufficient evidence to support the findings. In the case of a grounding by a vessel there is a rebuttable presumption or inference of negligence, because vessels under careful navigation do not run aground in the ordinary course of things. This is particularly true when the grounding occurs in shoal water which is clearly designated on navigational charts. In

reference see Commandant Appeal Decision 1565 (JEREMIC). The facts produced in this case show that the grounding occurred on a clearly marked shoal surrounding Guayanilla Entrance Buoy No. 2. The charted position of this buoy is some 75 feet on the shoal side of the channel entrance. When the S/S SABINE came to rest on the shoal bottom, this buoy was some 75 feet abeam to starboard, clearly indicating that the vessel had left the channel, as charted, when it grounded. It was therefore reasonable for the Administrative Law Judge to indulge in use of the aforementioned presumption, and the burden of producing evidence to show lack of negligence shifted to the Appellant.

The specification to charge I fully apprised the Appellant of the specific facts which were the basis of this charge; that is that the vessel grounded at a particular location while the Appellant was in command and that the reason for the Appellant's preparation of his defense, by producing evidence to explain the occurrence.

The evidence produced showed that the Appellant had the "control" of the vessel as it approached Guayanilla Harbor, and that he made the decision to enter the harbor channel instead of waiting for the arrival of a local pilot. Further, the Appellant only made one "fix" on his position while maneuvering his ship to enter the harbor, that one being taken some 35 to 40 minutes before the grounding. He made no further effort to fix his position either by visual bearing or by radar. Without these measurements it was impossible to plot the vessel's position and movement on the navigational charts which, as indicated before, revealed the location of the shoal water which bordered the channel. In fact, no effort was made to use the navigation as charts, even as a general reference. Instead, the Master chose to rely on his past experience in guiding the vessel.

In his appeal, the Appellant argues that he has navigated this harbor safely many times in the past, that the place of the grounding of the S/S SABINE was the site of several prior groundings by other ships, and that in making his navigational decision he was deceived by the position to the Guayanilla Entrance Buoy No. 2 which was off station. the Appellant's past experience in leading ships into the Guayanilla Harbor would indicate, if anything, that he should exercise a higher degree of care than other, less experienced, masters. the fact that there had been prior groundings at this site should have served as additional notice to the Appellant of the hazards of the approaches to the channel near Guayanilla Entrance Buoy No. 2. the Administrative Law Judge made the factual finding that this buoy was on station and at its charted location at the time of the grounding. This fact was substantiated by harbor charts which were introduced into

evidence, and the position of the S/SSABINE after the grounding in relation to this buoy. However, regardless of this factual finding, the Coast Guard has publicly warned mariners, through 33 CFR 63.25-55, that the buoys serviced and maintained by this Agency are liable to be carried off station due to prevailing weather conditions and advises that mariners gain their bearings by sightings on fixed objects and aids to navigation on shore.

In his brief, the Appellant cites four Commandant's Decision in support of his appeal. Commandant Opinion No. 774 is offered to show that previous groundings of other vessels in the same place indicates lack of negligence in a current grounding. This decision dealt with a grounding of a vessel during anchorage in unfamiliar surroundings. Although evidence was introduced that other ships had grounded in the same area, this was not a material factor in the decision. the opinion in this case does not suggest that prior groundings by other ships is an indication of lack of negligence for current groundings in a familiar and well charted area.

Commandment Opinion No. 775 is cited as precedent for the statement "a mere error is not negligence." The truth of this quote is not argued. However, the fact finder in the case at hand made a factual determination that the Appellant's actions constituted negligence and not a mere error in judgement. A mistake in judgement is a poor choice between alternatives which a competent licensed officer might reasonably have made." Commandment's Appeal Decision 1755 (Ryan). Failure to use proper methods for plotting position, and the running aground outside a charted channel can hardly be called a poor choice of alternatives which might reasonably have been made.

Commandment Opinion No. 1738 involved the grounding of a vessel inside a marked channel where a buoy was out of place. This case can be distinguished on its facts from the one now under consideration as the grounding of the S/S SABINE occurred outside the marked channel and the Administrative Law Judge made a factual finding that the No. 2 buoy was on station. Therefore, a reasonable man would not rely solely on visual sightings of buoys and a single fix on a land object, in the navigation of his vessel. But the Appellant chose not to utilize fixed landmarks in taking visual bearings and did not attempt to plot his position on navigational charts.

Finally, Appellant cites Commandment Appeal No. 1740, to support his contention that he, "may have been misled." Appeal No. 1740 stated that deception by the owner may be a factor to be considered when reviewing the appropriateness of a penalty. However, that case dealt with violation of a different statute and involved an outright suspension of a license. the possibility of

the Agent's false representations to the Appellant has been considered as a mitigating factor on appeal.

CONCLUSION

The Appellant, by not maintaining an official logbook and by sailing without having executed shipping articles violated 46 USC 564. These violations of Federal law occurred while the Appellant was acting under the authority of his Master's license and will support a finding of misconduct under 46 USC 239.

Further, the Appellant, in navigating the S/S SABINE in its approach to Guayanilla Harbor, did not act in a manner which a reasonable and prudent man, under similar circumstances, would have conducted himself. His actions, or lack thereof, were the primary causes for the grounding of the vessel and will support a finding of negligence under 46 USC 239.

ORDER

The order of the Administrative Law Judge dated at Jacksonville, Florida, on 21 November 1974, is AFFIRMED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 16th day of Sep 1975.

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